

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAR 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0046
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ALFRED ALEXANDER LAMADRID,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074044

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

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By Ron Reyna

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Alfred Lamadrid was convicted of two counts of driving while under the influence of an intoxicating liquor (DUI) and two counts of

aggravated driving with an alcohol concentration (AC) of .08 or more. He was sentenced to mitigated, concurrent, seven-year prison terms on the AC-related convictions, and sixty days in the Pima County Jail for the DUI convictions. On appeal, Lamadrid claims the trial court erred in denying his motion for substitution of trial counsel. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). After Lamadrid was arrested and indicted, attorney Eric Larsen was appointed to represent him. Lamadrid initially refused Larsen’s representation, suggesting he would hire his own attorney, and Larsen was “relieved from further responsibility” on the case. About one month later, however, Lamadrid informed the court that he “wish[ed] to have [Larsen] re-appointed to represent him in th[e] case,” and the court did so.

¶3 At a subsequent pre-trial conference, Larsen informed the court that Lamadrid again wished to obtain private counsel. The court then ordered that Larsen again be relieved of his responsibility to represent Lamadrid so long as Lamadrid’s private attorney filed a notice of appearance by the next hearing. Lamadrid apparently was unable to retain a private attorney but telephoned Larsen and informed him that he wished to have a private attorney represent him at trial. On the first day of trial, Lamadrid did not appear. Larsen informed the court that he had experienced difficulty contacting and meeting with Lamadrid before trial and that “LaMadrid ha[d] made it very

difficult . . . to represent him . . . [because of] his lack of trust.” Larsen therefore asked the court to continue the trial to allow Lamadrid to obtain private counsel.

¶4 The court denied Larsen’s motion, stating that Lamadrid had “indicated” he would obtain private counsel several months before trial started and the court had “advised him then if he was going to do it he needed to do it quickly, that it wasn’t going to be done at the last minute, it couldn’t be done to delay the case.” The court then informed Larsen that “LaMadrid put himself in an untenable situation. . . . [T]hat is his doing, not the Court’s and not . . . Larsen[’s]. So the request to postpone [and substitute counsel] is denied.” Lamadrid appeals from this ruling.

Discussion

¶5 As a preliminary matter, we first address the state’s contention that this court lacks jurisdiction over the appeal because Lamadrid did not file his notice of appeal within the twenty days required by Rule 31.3, Ariz. R. Crim. P. Pursuant to Rule 31.3, a “notice of appeal shall [generally] be filed . . . within 20 days after the entry of judgment and sentence.” The trial court may, however, permit a defendant to file a delayed notice of appeal in accordance with Rule 31.3(b) if the failure to file a “notice of appeal within the prescribed time was without fault on the defendant’s part.” Ariz. R. Crim. P. 32.1(f).

¶6 Lamadrid filed his notice of appeal on February 11, 2009, twenty-six days after the judgment was filed. Accordingly, this court dismissed Lamadrid’s appeal as untimely. We subsequently reinstated the appeal, however, after the trial court permitted Lamadrid to file a delayed notice of appeal. The state has not argued that this order is

invalid. Because Lamadrid’s notice of appeal was filed by the date specified in the trial court’s order, this court has jurisdiction over his appeal.

¶7 Citing A.R.S. § 13-4033(C), the state also argues that even if Lamadrid’s notice of appeal was timely, he forfeited his right to appeal by voluntarily absenting himself from trial and causing his sentencing to occur more than ninety days after his conviction. Pursuant to that statute, a “defendant may not appeal . . . if the defendant’s absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary.” § 13-4033(C). Because Lamadrid was tried in absentia and sentenced six months after being convicted, the state asserts he has waived his right to appeal under § 13-4033(C).

¶8 In *State v. Soto*, No. 2 CA-CR 08-0405, ¶¶ 13-14, 2010 WL 426210 (Ariz. Ct. App. Feb. 8, 2010), however, this court held § 13-4033(C) is unconstitutional except in cases in which the state can establish that a “defendant’s voluntary failure to appear timely for a sentencing hearing demonstrates a knowing, voluntary, and intelligent waiver of his constitutional right to appeal.” A defendant waives his right to appeal when he is personally advised of that right and advised that a delay in sentencing may result in its waiver. *Id.* ¶¶ 15, 18-19.

¶9 Lamadrid was arraigned in October 2007—months before § 13-4033(C) became effective or was even enacted. *See* 2008 Ariz. Sess. Laws, ch. 25, § 1. The statute still was not in effect on the date of Lamadrid’s trial. *Id.* The record does not demonstrate that Lamadrid was informed about the implications of § 13-4033(C).

Accordingly, under *Soto*, he did not waive his right to appeal, and we address the merits of his claim.

¶10 Lamadrid argues the trial court erred in refusing his request to substitute his appointed counsel with a private attorney on the first day of trial. We review the trial court’s ruling on such a motion for a clear abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007).

¶11 A criminal defendant has a Sixth Amendment right to representation. U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963); *see also* Ariz. Const. art. II, § 24. But a defendant is not “entitled to counsel of choice, or to a meaningful relationship with his or her attorney.” *State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998). When evaluating a request for new counsel, the trial court must “balance the rights and interests of a defendant with judicial economy,” *id.*, by considering the following factors:

whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

State v. LaGrand, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987); *see also State v. Torres*, 208 Ariz. 340, ¶ 15, 93 P.3d 1056, 1060 (2004).

¶12 Lamadrid asserts that the trial court ignored the above factors and instead “focused exclusively on the timing of [his] motion” for substitution of counsel. But the court is not required to enumerate each factor it considers; *LaGrand* and its progeny

merely require that the court consider these factors. 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70; *see, e.g., Torres*, 208 Ariz. 340, ¶ 15, 93 P.3d at 1060. And, we may “assume the trial court made all necessary [*LaGrand*]-related findings required to support its ruling.” *See State v. Peralta*, 221 Ariz. 359, ¶ 9, 212 P.3d 51, 53-54 (App. 2009).

¶13 Here, the trial court mentioned Lamadrid’s previous substitution requests and the time period that had passed between Lamadrid’s initial request and the first day of trial. And Larsen explained the challenges he had faced in representing Lamadrid. Although the court did not explicitly list the *LaGrand* factors in its denial of Lamadrid’s motion, the record clearly shows that the court considered them. *See id.* (“We will affirm if any reasonable construction of evidence justifies the [trial court’s] decision.”).

¶14 Lamadrid also argues, however, that the trial court erred because it ignored evidence that there was “an irreconcilable conflict” between himself and Larsen. But Lamadrid has the burden of proving an irreconcilable conflict existed, and he has not done so. *See id.* ¶ 5. Rather, he merely has shown he was “unhappy” with and did not trust his court-appointed attorney. *See id.* (lack of trust not sufficient for appointment of new counsel). Lamadrid in substance contends he should have been permitted to change attorneys at will, despite being given the opportunity to do so several times before the first day of trial. But Lamadrid asked the court to reappoint Larsen when he was initially unable to hire a private attorney, an act that weighed against finding that any conflict existed, much less one that was irreconcilable. And although, as Lamadrid contends, Larsen did state that there was a “lack of defense preparation for the case,” any lack of preparation was due to the fact that Lamadrid did not participate in his defense before

trial and therefore does not constitute an irreconcilable conflict. *See id.* ¶ 18 (when defendant refuses to assist counsel in preparing for trial, defendant cannot then “compel a change of counsel by . . . arguing that his relationship with counsel is fractured”). The trial court did not err in denying Lamadrid’s motion.

Disposition

¶15 In light of the foregoing, we affirm Lamadrid’s convictions and sentences.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge